IN THE SUPREME COURT

STATE OF MICHIGAN

Appeal from the Michigan Court of Appeals
Stephens, P. J., and Hoekstra and Meter, JJ.

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

LORINDA IRENE SWAIN,
Defendant-Appellant.
_____/

Supreme Court No. 150994

Court of Appeals No. 314564

37th Circuit Court No. 2001-004547FC

PLAINTIFF-APPELLEE'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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COUNTER-STATEMENT OF JURISDICTION

The Court granted leave to appeal on September 30, 2015. Plaintiff-Appellee agrees that Defendant-Appellant's Statement of Jurisdiction is substantially complete and correct.

COUNTER-STATEMENT OF QUESTIONS

I. Whether the test in *People v Cress*, 468 Mich 678, 692 (2003) applies to determine whether a successive motion for relief from judgment is based on "a claim of new evidence that was not discovered before the first such motion" under MCR 6.502(G)(2)?

Plaintiff-Appellee answers, "Yes."
Defendant-Appellant answers, "No."
The trial court answered, "Yes."
The Court of Appeals answered, "Yes."

II. Whether Defendant is entitled to a new trial based on her claim under *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963)?

Plaintiff-Appellee answers, "No."
Defendant-Appellant answers, "Yes."
The trial court answered, "Yes."
The Court of Appeals answered, "No."

III. What standards apply to a defendant's assertion in a MCR 6.502(G) motion that the evidence shows there is a significant possibility that he is actually innocent and does Defendant meet that standard or standards?

Plaintiff-Appellee answers, "No."
Defendant-Appellant answers, "Yes."
The trial court answered, "Yes."
The Court of Appeals answered, "No."

IV. Do the Michigan Court Rules provide a basis for granting relief for a defendant who demonstrates a significant possibility of actual innocence?

Plaintiff-Appellee answers, "No."
Defendant-Appellant answers, "Yes."
The trial court did not answer.
The Court of Appeals did not answer.

V. **If MCR 6.502(G) bars relief, is there an independent basis for Defendant to seek relief under the Michigan Constitution or the United States Constitution and is Defendant entitled to relief?**

Plaintiff-Appellee answers, "No."
Defendant-Appellant answers, "Yes.
The trial court answered, "Yes."
The Court of Appeals answered, "No."

VI. **Is Defendant entitled to a new trial under MCL 770.1?**

Plaintiff-Appellee answers, "No."
Defendant-Appellant answers, "Yes."
The trial court answered, "Yes."
The Court of Appeals answered, "No."

INTRODUCTION

"No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved." *Mackey v United States*, 401 US 667, 691; 91 S Ct 1160; 28 L Ed 2d 404 (1971) (Harlan, J., concurring in part and dissenting in part).

This case presents a quintessential example of what lack of finality in criminal judgments looks like. Despite the rule prohibiting defendants from filing multiple motions for relief from judgment, Defendant Swain ("Defendant") has filed three or more, amending the most recent one to add another claim in continued attempts to discredit her son's trial testimony that she molested him as a child. But the jury was presented with evidence of recantation at trial, something the victim was questioned about, but indicated it was after being pressured to recant:

> Question: Okay. And of the people that were there that weekend, who talked to you about testifying at the trial?
>
> Answer: All of them.
>
> Question: Okay. And didn't they, in fact, tell you to come in here and say it didn't happen?
>
> Answer: Yeah.

(29b.)

Years later, the trial prosecutor recalled that while R.S. and his brother were at their grandparents' home (Defendant's parents), they were pressured for two to three days about their upcoming testimony. R.S. bowed under that pressure, telling his grandparents that nothing happened because he wanted them to stop bothering him about it. (395a-396a.) The assistant

prosecutor testified during the more-recent evidentiary hearing that she told the victim at the time of the trial:

> Answer: [Y]ou need to tell me if this didn't happen to you, you won't be in trouble, but I need to know that now. I said, on the other hand, if this did happen to you, this is your opportunity to tell people that your mother did it to you. And I let him make that decision.
>
> Question: Did he make a decision?
>
> Answer: He did.
>
> Question: What was the decision?
>
> Answer: He told me I want to go back in the courtroom and tell about what she did to me, and that's what he did.

(399a.) But, after trial, the assistant prosecutor learned that though R.S. was not recanting his testimony, "he was unhappy with the length of sentence that the court imposed[,]" for his mother. (399a.) Victims of child sexual abuse may experience such feelings of guilt. *U.S. v Rouse*, 410 F 3d 1005, 1009 (CA 8 2005) ("'in cases of child sexual abuse [ ] recantation is a recurring phenomenon,' particularly 'when family members are involved and the child has feelings of guilt or the family members seek to influence the child to change [his] story." (Quoting *United States v Provost*, 969 F 2d 617, 621 (CA 8 1992), cert den 506 US 1056; 113 S Ct 986; 122 L Ed 2d 139) (1993)).

At the center of this case – buried beneath a pile of pleadings and transcripts resulting from the myriad postconviction pleadings – lies the testimony of a boy, who despite pressure placed on him by family, wanted to tell the jury what his mother did to him. He did, and they believed him. The jury's verdict should be honored.

COUNTER-STATEMENT OF FACTS

In light of the extensive history of this case, the People set forth the following statement of facts and procedural history, summarizing material events and facts, while other facts are included within the arguments below as they relate to the issues raised on appeal. See also *People v Swain*, 288 Mich App 609, 612-617; 794 NW2d 92 (2010) (outlining the facts and procedural history until that point in time).

Material Case History

In August, 2002, Defendant was convicted by jury of four counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a), for acts perpetrated on her son, R.S. On direct appeal, Defendant asserted: (1) she was deprived of the effective assistance of counsel;[1] (2) an expert witness improperly testified that the victim exhibited behavior consistent with that seen in sexually abused children; and (3) that the trial court abused its discretion when it denied Defendant's motion for a new trial based on newly discovered evidence of victim recantation. The Michigan Court of Appeals disagreed, affirming the convictions. (79a-81a.) Defendant did not seek leave to appeal this decision to this Court.

Years later, and after filing a motion for relief from judgment under MCR 6.500 et. seq., and other post-appeal motions, Defendant filed a successive motion for relief from judgment. Upon order of the trial court, the People filed a response, asking the court to dismiss the successive motion for relief from judgment, as improperly filed under MCR 6.502(G). See *People v Swain*, 288 Mich App 609, 618-619; 794 NW2d 92 (2010). But the trial court ordered the prosecution to respond to the merits of the motion. *Id.* The trial court granted Defendant relief from

[1] A *Ginther* hearing was held. *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

judgment, which the Michigan Court of Appeals subsequently determined was an abuse of the trial court's discretion. *Id.* This Court denied Defendant's application for leave to appeal, *People v Swain*, 488 Mich 992; 791 NW2d 288 (2010), and motion for reconsideration. *People v Swain*, 489 Mich 902; 796 NW2d 257 (2011).

After the trial-court decision was reversed on appeal, the trial court granted Defendant's motion to supplement her successive motion with another issue and ordered an additional evidentiary hearing on the claim. The People sought leave to appeal, asserting that the trial court abused its discretion by allowing Defendant to supplement a successive motion for relief from judgment which was ruled by the appellate court to have been improperly granted. The People's application for leave to appeal from this decision was granted, (105b),[2] but the Court of Appeals affirmed the trial court's decision, and remanded for an evidentiary hearing. (160a-164a.)

The crux of the matter before the Court involves Defendant's assertion that there was newly discovered evidence involving one of her boyfriends (Dennis Book) during the 1990's and that the prosecution violated *Brady v Maryland*, 373 US 83; 83 S Ct. 1194 (1963). After holding an evidentiary hearing (on Dec. 20, 2011 and April 26, 2012), the trial court granted Defendant's "most recent motion for relief from judgment" on three theories: *Brady v Maryland*, MCL 770.1 and *Herrera v Collins*, 506 US 390; 113 S Ct 853; 122 L Ed 2d 203 (1993). (488a, 499a.) The People sought leave to appeal and the Michigan Court of Appeals reversed. (500a-510a.) The Court granted leave to appeal. (107b-108b.)

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[2] "In addition to the issues raised . . . the parties shall brief whether the proffered amendment, which is designed to add a claimed violation of *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), is futile where, accepting the averments of Dennis Book as true, defendant knew or should have known the essential facts permitting her to take advantage of any exculpatory information possessed by Book at the time of trial[.]" (105b.)

During the course of these proceedings, the People have sought to revoke Defendant's bond, reinstate her convictions, and asked the Court of Appeals to remand this matter before a different circuit court judge. These requests were denied and bond continues. (163a-164a.)

Preliminary Examination

The district court granted the prosecution's request for special procedures, permitting R.S. to testify out of sight of his mother (who watched by closed-circuit television) or others. (1b-2b.) R.S. described Defendant putting her mouth on his penis while they shared a bed at night while Defendant slept in the nude and in the morning when she got him undressed. (3b.) R.S. said this happened, "[m]ore than 20" times. (4b.) These events happened at the trailer near Turtle Lake. (Id.) When they moved to Defendant's parents' home on Oak Grove these acts continued there, R.S. recalled: "Yeah, she would do it to me at night[,]" while Defendant continued to sleep "buck naked" with him. (5b.) Again, R.S. said this happened "[m]ore than 20" times. (6b.)

The Trial

Ronal Swain, Defendant's ex-husband, stated that he and Defendant adopted two boys: C.S. (four months old) and R.S. (1 ½ years old, DOB 10/24/87) before they divorced in the early 1990's. (7b.) The boys stayed with Defendant, though Ronal Swain indicated he wanted custody but Defendant made threats which apparently made this impossible. (8b-9b.) Ronal Swain also indicated that his work schedule at the Michigan Department of Corrections would have made it difficult for him to have custody of the boys. Ronal Swain provided child support for the boys on a consistent basis though between 1994 and 1996, though he acknowledged he did not see them as often. (9b, 15b.) However, Ronal Swain gained full custody of the boys in 2000. (10b.) The boys were performing poorly at school at this time. (11b.) Ronal Swain's current wife, a teacher,

enrolled the boys in special education programs. (12b.)

In June of 2001, Ronal Swain learned that R.S. had engaged in sexual activity, spoke to R.S. about it and searched his bedroom. (12b.) R.S. had several pairs of his step-mother's underwear under his bed and in his closet. (12b.) At this time, R.S. disclosed to his father what Defendant had done to him. (13b.) R.S. was also having trouble, fighting at school. Ronal Swain sought out help for R.S. which included counseling, though he continued to find women's underwear in his son's bedroom until the time of trial. (13b-14b.)

The sexual abuse and disclosure

At trial, R.S. described being afraid to tell his father and step-mother about what Defendant did to him. R.S. said he did not want his mother to get into trouble. (21b-22b.) R.S. said he was asked about some things he did sexually with another child, and he thought he was going to get in trouble for this. (24b-25b.) After this came to light, R.S. disclosed the abuse. (25b.) But R.S. ran away from his father's home shortly before trial and went to his grandparents' home (Defendant's parents). (29b.) R.S. testified that family members were there who talked to R.S. about testifying at trial – telling R.S. to say nothing had happened. (29b.)

R.S. was fourteen years old at the time of trial. (35a.) R.S. said he was five years old when his mother began molesting him, recalling he was in the "young fives" program at school, and that the first time occurred in their living room. (23b, 28b.) R.S. described the trailer where he lived with his mother and brother, C.S., as having two bedrooms: one the boys shared and slept on bunk beds. (37a.) The boys rode the bus to school, but, sometimes, Defendant sent C.S. outside while R.S. waited inside with Defendant. (38a.) Defendant helped R.S. get dressed. (39a.) R.S. affirmed something happened with his private part and his mother, but then R.S. said he could not

tell what happened. Later, R.S. stated he did not remember anything else. (40a.) After the jury was excused, R.S. admitted he was scared to testify in front of Defendant and he could not testify while she sat there in front of him. (41a.)[3]

After the jury returned, R.S. continued his testimony, stating he did remember what Defendant had done to him but he did not want to say it out loud. While his brother was outside, R.S. said Defendant would help him change his clothes, putting her mouth on his penis. C.S. would knock on the door when the bus was coming, and Swain would stop abruptly and get R.S. dressed. R.S. testified at trial that this happened every day during the week. Defendant told R.S. not to tell anyone about this because she could get into a lot of trouble. (46a-47a, 21b.)

Between 1995 and 1996, R.S., C.S. and Defendant moved in with her parents where they shared a bedroom. (47a, 16b.) There was a queen-size bed and one small bed in the room they shared. C.S. slept alone in the small bed while R.S. and Defendant slept in the queen-size bed together. R.S. wore boxer shorts to bed while Defendant slept in the nude. (17b-18b.) If Defendant heard her father coming up the stairs to check on them, she would get dressed. R.S. said while he was sleeping, he would feel spit on his penis, but he could not really describe the things that happened while he was sleeping. At times, R.S. said he would lie to Defendant, telling her that he would be upstairs in a minute, but then wait for her to fall asleep before going to bed. Otherwise, he said he would fall asleep downstairs to avoid sharing a bed with his mother. (18b-19b.)

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[3] The prosecution filed a motion for special procedures, asking to close the courtroom to the public and Swain's family who were present, but the request was denied, though individuals in the courtroom apparently were making gestures while R.S. testified. (42a-45a.)

When asked at trial whether Defendant treated the boys differently, R.S. testified that Defendant treated "me like a boyfriend and treat[ed] [C.S.] like a slave." (20b.) C.S. did the majority of the chores, while R.S. barely did any. Defendant gave R.S. more money and let R.S. drive the car, though he was not old enough to drive. Defendant kissed C.S. on the forehead or cheek but kissed R.S. on the lips. (21b.)

C.S. was thirteen years old when he testified at trial. (49a.) C.S. recalled that he would sometimes wait for the school bus outside, alone, and then would yell to his brother when the bus arrived. (51a.) C.S. also said Defendant treated the boys differently – C.S. said Defendant gave R.S. more money and that she "treat[ed] [R.S.] like a boyfriend." (52a.) Defendant made C.S. do more chores than R.S. She kissed C.S. on the cheek but kissed R.S. on the lips. (52a.) At their grandparents' home, C.S. also recalled that he slept in his own bed while his mother and brother shared a bed. (43b.) C.S. was mad about the disparate treatment he perceived, feeling that R.S. received special treatment. (44b.)

Dr. Haugen, Child Protective Services and Investigation

Dr. Haugen testified during trial as an expert qualified in child sexual abuse and offenders. (32b-34b.) R.S. was referred to Dr. Haugen in August, 2001, because R.S. was exhibiting inappropriate sexual behavior. (40b.) R.S. was exhibiting behavior that some sexually abused children do, including: sexually reactive behavior toward other children, compulsive masturbation, and hoarding. (41b.) Although Dr. Haugen agreed there may be other explanations for such behavior, Dr. Haugen stated that if a child were falsely accusing someone of abusing them, it would be unlikely that such behavioral manifestations would be present, behavior such as sexual inappropriateness, aggression, or anxiety. (42b.)

Dr. Haugen also spoke to delay in reporting sexual abuse by a child. Several reasons may be attributed to the delay, such as embarrassment, feelings of blame or the consequences; the child may feel they will get in trouble. And in family situations, the child may feel a traumatic event might happen to the perpetrator, depending on the relationship, or the perpetrator may make threats. Dr. Haugen explained these cases can be very emotional such that it is easier to deny or avoid discussing the abuse. (35b.) Moreover, if the child and perpetrator share a close relationship, there could be a delay in reporting. Dr. Haugen explained that, in his experience, the perpetrator will typically "groom the victim" by spending extra time with them, nurturing them, or offer special gifts or privileges. (36b.)

Dr. Haugen testified that when the relationship is between a parent and child, the child may delay reporting to maintain the relationship, regardless of the abuse. (37b.) However, once a child is removed from this environment, and begins to feel secure in their new environment, the child may disclose the abuse, if they have not blocked the memories. (38b.) Dr. Haugen indicated that children who have been sexually abused may exhibit sexually inappropriate behavior leading to the discovery of the abuse, though the child will often minimize it. (39b.)

Sarah Bleeker, employed with Sexual Assault Services, interviewed both R.S. and C.S. (45b-46b.) When R.S. first met with a Child Protective Services (CPS) worker, he did not tell them what happened because he was nervous. But the second time, R.S. said he told them about numerous instances of penile-oral contact with his mother. (26b-27b.) R.S. told Bleeker initially that he moved in with his father because Defendant was being bad to him and his brother; that Defendant was nice to him but not C.S.; that Defendant slept in the nude with him even though he asked her not to; and that when C.S. slept with them on occasion, Defendant wore clothes. (30b-31b.)

After receiving a complaint of criminal sexual conduct from CPS, Detective Guy Picketts was assigned to follow it up in August, 2001. (47b-48b.) Det. Picketts investigated instances at both 1669 Nine Mile Road and 6504 Oak Grove Road. (48b.) R.S. indicated that his mother performed oral sex on him when she changed his clothes. (55b.) R.S. also indicated that while C.S. was in another room, Defendant performed oral sex on him in the bedroom. (55b-56b.)

Det. Picketts met with Defendant and advised her of his investigation. (49b, 58a.) Defendant asked about the type of complaint to which the detective testified that, "initially, my first statement, I didn't get to complete my sentence, I said it involved oral sex," but that "once I started to say that the complaint involved oral sex, she immediately became rather vocal and animated, and made a statement in regards to that." (59a.) Det. Picketts testified that "She blurted out and her exact words [were], 'I never sucked my kid's d***.'" (59a.) Det. Picketts was surprised by this statement because he stated that the complaint involved oral sex – not that "she had done that to her son." (59a, 50b.)

Det. Picketts asked Defendant what she meant; Defendant replied that is what oral sex was all about. Defendant also told the detective that her ex-husband and his wife were forcing the boys to make these statements. Defendant also indicated that R.S. concocted a big lie, though she also said R.S. was special to her. (59a, 50b.) Defendant contradicted herself, telling Det. Picketts that R.S. "never lies." (51b.) Defendant indicated she had slept with R.S. (51b.) She first told Det. Picketts that she changed R.S.'s clothes when he was little, not when he was eight or nine years old, but later admitted she did change his clothes when he was eight or nine to hurry him up. (52b.) These inconsistencies struck Det. Picketts as significant because, as he stated, when people are telling the truth they do not usually change their stories. (52b-53b.)

Deborah Charles was incarcerated at the time of the trial, and had been for over a year for uttering and publishing. (53a, 57b.) Charles was not promised anything for her testimony. (57b.) Charles and Defendant were incarcerated in the same facility. (58b-59b.) Charles described Defendant as a fast talker and edgy. Defendant asked Charles what she was incarcerated for, so she asked Defendant the same question. Defendant told Charles: "They're saying that I sucked my son's d***. I didn't suck that little bastard's d***." (60b.) Charles said Defendant mostly talked about her case in her fast and erratic manner, describing Defendant as seeming nervous, frustrated, or in a state of "craziness." (60b-63b.)

After a time, Charles said Defendant changed her initial denials, and seemed to want to confide in her. Defendant confided she slept with her son naked and that she had been prostituting herself to support her crack cocaine addiction. Charles said as Defendant grew more comfortable with her, she admitted to oral sex with R.S. Defendant also told Charles it was because she was on crack, and, at times, did not know what she was doing. (54a-55a.) Charles said it was "quite eerie" how Defendant referred to her son's appearance, admitting to Charles that she would kiss R.S. on the lips, but C.S. on the cheek because R.S. was more attractive and Defendant said she could not help herself. (55a-56a.)

After learning that Charles was a potential witness in her upcoming trial, Charles said that Defendant told her she would be sorry if she testified. Defendant also told Charles she did not understand, that R.S. would change his mind once he became bored with his dad and step-mother and would want to go back to her. (64b-65b.) Charles said she continued to receive threats from Defendant regarding her testifying and other inmates threatened Charles, telling her she had a loyalty to a fellow inmate. (65b-67b.) At one point, Defendant gave Charles a paper to sign,

saying she knew nothing and would not testify, but Charles said she would not sign it. (68b.) Donna Trapani was present at this time, saw the paper Defendant wanted Charles to sign, something to the effect of: "sign this saying I didn't say that[.]" (69b-70b.) Trapani said Defendant seemed upset and was talking very fast, going on and on. (70b.)

Defendant Swain testifies at trial

Defendant was divorced sometime in 1991. (71b.) She said she began using crack due to her divorce and depression. (73b.) Defendant's boyfriend after the divorce was Eldon McDowell. (72b-73b.) Defendant said she and McDowell were together for about 1 ½ years, living in a trailer on Turtle Lake Road with her sons until 1993 or 1994. (74b-76b.)

After her relationship with McDowell ended, it was just Defendant and her sons for a time. (75b.) Next, Defendant said she lived in another trailer, on Nine Mile Road, with her second boyfriend, Steve Way, in 1994 or 1995. (77b.) Defendant said she and Way broke up in 1995 or 1996, or "right around '96." (78b.) Steven Way testified that he and Defendant met in the spring of 1994 and the relationship continued until the summer of 1995. When they first met, Way said Defendant lived in a trailer on Turtle Lake, but when he lived with her it was in the trailer on Nine Mile Road from early December, 1994 through the summer of 1995. (62a-63a)

Dennis Book was Defendant's third boyfriend after her divorce. (79b.) Defendant said that her relationship with Book began in 1996 or 1997. (80b.) Unlike Steve Way, she rarely had Book watch her sons. And Book worked a lot. Thus, Defendant said she took her sons to a sitter's or her sister's or sister-in-law's or her parents' house the majority of the times for babysitting because she said Book was too strict with the boys. (81b-82b.)

When the boys went to school, Defendant said that sometimes she took them. At times Defendant said her boyfriend would do so and other times the boys rode the bus to school, depending on the day. (81b-82b.) Defendant and Book were together until she said she moved to Kentucky "to get away from Dennis, [and] to get away from crack." (80b, 85b.) Defendant said she started using cocaine, then crack again when she was living with Book (though he did not). (86b.)

After moving to Kentucky for about four months, Defendant and her sons moved back to her parents' home (on Oak Grove Road) after she said she learned she was not permitted to take her sons out of state and she was in contempt of court. (86b-87b.) Although there were other rooms in the Oak Grove house, and Defendant said she did not want her sons to sleep in the same room, that was often what happened. (88b.) Defendant began using drugs again and stealing from her parents. (89b.) Defendant pled guilty to an offense stemming from using her parents' credit cards and was initially granted probation, which she violated. (90b-91b.) During this time while she was on and off probation, in and out of treatment programs or jail, R.S. and C.S.'s father and his wife took custody of the boys in early 2000. (92b, 94b.) After she fled in the face of another probation violation for six months before she was caught (resulting from a positive drug test though Defendant said she really wasn't using and the test was wrong) Defendant was sent to prison. (93b.)

Defendant testified that when Det. Picketts came to see her she agreed to speak to him and that it was regarding a "CSC complaint." (95b.) Defendant said she did not know what that meant; she gave Det. Picketts a look who Defendant then said told her that "your son is saying that you had oral sex with him." (Id.) Defendant continued:

> I said I don't believe my kid said that. And [Detective Picketts] said I saw your - I witnessed your kid saying that. I said, well, my kid doesn't lie and I didn't suck his d***. He said how did you know he said you sucked his d***? I said because you said that he said I had oral sex with him and that's what oral sex is. . .

(Id.) During her testimony, Defendant repeated she "didn't suck his d***." (97b.) Defendant also denied that she was high on crack when she committed these acts, explaining that she only smoked crack in crack houses or other people's homes (not around her children) and that she prostituted herself in the city of Battle Creek (not at home). (96b-97b.)

Defendant denied ever sending C.S. outside to wait for the bus, but that if he ever did it was probably because his friend was out there, but "they didn't ever go before the bus got there . . . they would go together . . ." and her neighbor and the bus driver could verify that. (96b.) But Defendant acknowledged there were times the boys missed school, as children do. (99b.)

Defendant said that R.S. had ADHD and required more attention than her younger son. (82b.) When asked if R.S. required additional discipline, Defendant answered that she "probably loved him too much for his own good and . . . I don't think I disciplined him like I should have." (83b-84b.) Defendant read a letter addressed to her, from C.S.: "Stop being a big baby. It made me so mad when you ran around all those nights. I hate when you boss me around and talk bad about my dad. I hate it when you lie to us. Tell everyone to leave us alone until you get out of prison, from [C.S.]". (98b.)

Additional facts will be set forth below as they relate to the issues raised.

ARGUMENT

I. A final conviction may be collaterally challenged in accordance with Subchapter 6.500 of the Michigan Court Rules. A defendant filing a successive motion for relief from judgment must first demonstrate that he meets one of two distinct exceptions in MCR 6.502(G)(2), and thereafter, that he is entitled to relief. The Court of Appeals correctly determined the trial court abused its discretion when it granted Defendant's amended successive motion for relief from judgment.

Standard of Review:

The trial court's decision on a motion for relief from judgment is reviewed for an abuse of discretion while factual findings in support of the trial-court decision are reviewed for clear error. *People v Swain*, 288 Mich App 609, 628; (2010). A court "by definition abuses its discretion when it makes an error of law." *Koon v United States*, 518 US 81, 100; 116 S Ct 2035; 135 L Ed 2d 392 (1996). Questions involving the interpretation of a court rule are questions of law, reviewed de novo. *People v Hawkins*, 468 Mich 488, 497; 668 NW2d 602 (2003) (citations omitted).

Discussion:

The trial court granted Defendant's amended successive motion for relief from judgment based on three theories: (1) *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), (2) *Herrera v Collins*, 506 US 390; 113 S Ct 853; 122 L Ed 2d 203 (1993), and (3) MCL 770.1. (499a.) The Court of Appeals properly determined that the trial court abused its discretion by doing so as Defendant's amended successive motion for relief from judgment was barred by MCR 6.502(G).

The trial court failed to follow the procedure set forth in Subchapter 6.500, et. seq., which was written to prevent unending post-conviction proceedings such as occurred in this case. The

rules implemented by the Court for post-appeal relief apply to cases that are no longer subject to direct review – as opposed to another procedure not contemplated by the rules – in order to preserve the trial as "the main event" in criminal prosecutions, *People v Reed*, 449 Mich 375, 392 n 1; 535 NW2d 496 (1995) (citing *Murray v Carrier*, 477 US 478, 506; 106 S Ct 2639; 91 L Ed 2d 397 (1986)).

"When called on to construe a court rule, this Court applies the legal principles that govern the construction and application of statutes." *Grievance Adm'r v Underwood*, 462 Mich 188, 193-194; 612 NW2d 116 (2000) (citation omitted). First, the Court looks to the plain language of the rule, and, if it is unambiguous, "must enforce the meaning expressed, without further judicial construction or interpretation." *Id.* "It is well established that [the Court] interpret[s] the words of a court rule in accordance with their 'everyday, plain meaning.'" *People v Petit*, 466 Mich 624, 627; 648 NW2d 193 (2002) (citation omitted). Further, when presented with a question of statutory construction, the Court's "primary task . . . is to discern and give effect . . ." to its intended purpose. *People v Gillis*, 474 Mich 105, 114; 712 NW2d 419 (2006) (citation omitted).

A. Motions for Relief from Judgment - the procedure adopted for challenging a conviction in state court after direct appeal

In *McDougal v Schanz*, 461 Mich 15, 27; 597 NW2d 148 (1999), the Court remarked that it "is not authorized to enact court rules that establish, abrogate, or modify the substantive law. Rather, as is evident from the plain language of art. 6, § 5, this Court's constitutional rule-making authority extends *only* to matters of practice and procedure." (Citing *Shannon v Ottawa Circuit*

Judge, 245 Mich 220, 222-223; 222 NW 168 (1928) (footnote and internal citation omitted).[4] Accord *People v Glass (After Remand)*, 464 Mich 266; 627 NW2d 261 (2001). But, "this Court's authority in matters of practice and procedure is exclusive and therefore beyond the Legislature's power to exercise." *People v Watkins*, 491 Mich 450, 472-473; 818 NW2d 296 (2012) (footnote and citations therein omitted). Moreover, "the United States Supreme Court has recognized a state's right to develop procedural rules that lead to issue forfeiture even where the procedural rules implicate constitutional protections if the rules serve a legitimate state interest." *People v Carines*, 460 Mich 750, 762; 597 NW2d 130 (1999) (quoting *People v Grant*, 445 Mich 535, 546-547; 520 NW2d 123 (2009)). Finality of judgments is a legitimate state interest. *Murray v Carrier*, 477 US at 490-491.

In 1989, the Court adopted Michigan Court Rules Subchapter 6.500 - Post-Appeal Relief, "[t]o create a uniform system of procedure," and rules intended to balance the ability of defendants to present claims on direct appeal with finality. *Reed*, 449 Mich at 388. This chapter of the court rules begins as follows:

> Unless otherwise specified by these rules, a judgment of conviction and sentence entered by the circuit court not subject to appellate review under subchapters 7.200 or 7.300 may be reviewed only in accordance with the provisions of this subchapter.

MCR 6.501 (Scope of Subchapter).

This Court discussed the procedural nature of Subchapter 6.500 and its purpose in *People v Reed*, 449 Mich 375; 535 NW2d 496 (1995): "The specific purpose for creating the

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[4] "The supreme court shall by general rules establish, modify, amend, and simplify the practice and procedure in all courts of this state. The distinction between law and equity proceedings shall, as far as practicable, be abolished. The office of master of chancery is prohibited." Const 1963, art 6, § 5.

postconviction procedure was to provide finality of judgments affirmed after one full and fair appeal and to end repetitious motions for new trials." *Reed*, 449 Mich at 381. The Court noted that "MCR 6.508 protects unremedied manifest injustice, preserves professional independence, conserves judicial resources, and enhances finality of judgments." *Reed* 449 Mich at 378-379 (internal footnote omitted).

Thus, MCR 6.500 et. seq. constitutes a chapter of rules adopted by the Court to serve legitimate state interests, including the important interest both society and the justice system share in preserving the finality of criminal judgments. See *Reed* 449 Mich at 378-379.

1. A defendant seeking to collaterally challenge a final conviction in a successive motion for relief from judgment must first satisfy one of the two distinct exceptions set forth in MCR 6.502(G)(2)

A defendant seeking relief from judgment under Subchapter 6.500 of the court rules is limited to "one and only one motion[.]" MCR 6.502(G)(1). Looking to the plain language of the court rule, *Grievance Adm'r v Underwood*, 462 Mich at 193-194, there are only two distinct exceptions to the one-motion rule: (1) the subsequent motion is based on "a retroactive change in the law that occurred after the first motion[,]" or, (2) "a claim of new evidence that was not discovered before the first such motion." MCR 6.502(G)(2). According to this language of the court rule, the trial court should not have accepted Defendant's successive motion for relief from judgment, and thereafter allowed her to amend it to include her *Brady* claim, when the motion did not meet the requirements of MCR 6.502(G)(2).

In a former appeal,[5] the Court of Appeals discussed successive motions, addressing the relationship between MCR 6.502(G) and 6.508(D)(3), stating in pertinent part:

> [W]e hold that MCR 6.502(G)(2) provides the only two exceptions to the prohibition of successive motions.
>
> MCR 6.508(D)(3), by its own language, applies to successive motions. It provides that if a motion for relief from judgment "alleges grounds for relief . . . which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter," a defendant is not entitled to relief unless the defendant demonstrates "good cause" and "actual prejudice." However, *MCR 6.502(G)(2) unambiguously provides that a defendant may only file a successive motion for relief from judgment in two circumstances* . . . Reading the "good cause" and "actual prejudice" requirements of MCR 6.508(D)(3) as a third exception to the general rule that a defendant may only file one motion for relief from judgment, MCR 6.502(G)(1), as the trial court did, contradicts the clear and unambiguous language of MCR 6.502(G)(2). *In addition, no part of a court rule should be rendered nugatory*. [Citation omitted]. If a defendant could obtain relief on a successive motion by only establishing entitlement to relief under MCR 6.508(D)(3), the prohibition against successive motions, MCR 6.502(G)(1), and the two exceptions to the prohibition, MCR 6.502(G)(2), would be rendered nugatory.
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> ***
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> [The] requirements of MCR 6.508(D)(3) are not relevant until, and are only relevant if, the trial court determines that the successive motion falls within one of the two exceptions of MCR 6.502(G)(2). Thus, we agree with the prosecutor that once the trial court determined that the testimony of [a school bus driver and a neighbor boy] was not new evidence discovered after defendant's first motion for relief from judgment, the trial court was required to deny defendant's successive motion.

People v Swain, 288 Mich App at 632-633 (emphasis added).

The People believe this two-part analysis is correct: a trial court presented with a successive motion for relief from judgment must first determine whether the successive motion meets one of the two distinct exceptions outlined in MCR 6.502(G)(2) (Successive Motions), and only after

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[5] The former appeal involved Defendant's successive motion for relief from judgment which she subsequently amended after it was ruled that the trial court abused its discretion by granting the successive motion. See Def's Appeal Br, 8-9. The amended successive motion constitutes Defendant's latest request for relief which includes the *Brady v Maryland* claim.

one of the exceptions is satisfied should the court proceed to determine whether the defendant is entitled to relief under MCR 6.508(D)(3) (Entitlement to Relief). To hold otherwise, or to read into the rule language which is not there, would effectively nullify rules and subvert their intended purpose – to create uniformity and finality where it was previously absent. See *Reed*, 449 Mich at 388 ("Before October 1, 1989, the procedure for collateral review of criminal convictions in Michigan did not make any provision for finality of judgments.")

2. The test set forth in *People v Cress*, 468 Mich 678, 692 (2003) should apply to claims brought under MCR 6.502(G)(2), and Defendant has not met the requirements of *Cress* – MCR 6.502(G)(1) barred her motion

The Court has asked (in question 1) whether: "the test set forth in *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003), for determining whether a defendant is entitled to a new trial based on newly discovered evidence applies in determining whether a second or subsequent motion for relief from judgment is based on 'a claim of new evidence that was not discovered before the first such motion' under MCR 6.502(G)(2)[.]" (107b-108b.) The answer should be yes. The Court determined in *People v Reed* that the *Strickland/Pickens*[6] standard applies for purposes of analyzing whether a defendant has established good cause under MCR 6.508(D)(3)(a) as opposed to another proposed standard not recognized by the Court. *Reed*, 449 Mich at 382. Similarly, the well-established test for analyzing claims purporting to raise newly discovered evidence, reaffirmed in *Cress* – applies to claims brought under MCR 6.502(G)(2).

The Court previously discussed the procedural nature of the rules at issue, MCR 6.500 et. seq., and, here, MCR 6.502(G) instructs trial courts how to proceed when presented with a

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[6]*People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994); *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984)

successive motion for relief from judgment. The court rule stating: "new evidence that was not discovered before the first motion," should refer to the test in *Cress*, 468 Mich at 692. The court rule, procedural in nature, references the well-established substantive test, reaffirmed in *Cress*. To adopt a lesser or different standard, contradictory to the well-established test for judging newly discovered evidence, contradicts the Court's constitutional rule-making authority. See *McDougal v Schanz*, 461 Mich at 27 (the Court is "not authorized to enact court rules that establish, abrogate, or modify the substantive law[.]").

Defendant asserts that the Court should rule that *Cress* does not apply to claims brought under MCR 6.502(G)(2) based on the plain language of the court rule, asserting that using the *Cress* test to determine whether a defendant meets the second (G)(2) exception would make it difficult for defendants to raise claims. A defendant filing a successive motion for relief from judgment does have an additional burden to overcome. But this is not a direct appeal. For example, the procedural posture of the instant case is a collateral attack three or four times removed from the direct appeal (depending on whether one considers defendant's amended/supplemental motion a separate motion or not). A higher burden is appropriate. To hold that no test, or an amorphous one, applies to determine whether a defendant has satisfied the requirements of MCR 6.502(G)(2), is contrary to the stated purpose of the rule: "to provide finality of judgments . . . and to end repetitious motions for new trials." *Reed*, 449 Mich at 381.

In *Reed*, the Court emphasized that a defendant seeking to overcome a procedural default based on ineffective assistance of counsel must meet the *Strickland* standard or "that 'some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule.'" *Reed*, 449 Mich at 382 (quoting *Murray v Carrier*, 477 US 478, 488; 106 S Ct 2639; 91 L Ef 2d 397 (1986)).

> [B]ecause failure to raise all colorable claims will expose appellate lawyers to malpractice suits and grievances, the approach would inevitably result in flooding the appellate courts with non-meritorious claims on direct appeal. Moreover, because in hindsight, the number of claims of arguable legal merit is virtually limitless, it is predictable that lawyers will decline representation that will expose them to grievances and civil sanctions, or will suggest that funding units should underwrite the cost of malpractice insurance.
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> The ultimate effect would profoundly destabilize the finality of judgments beyond what occurred under the previous procedure, and exponentially increase the burdens on appellate counsel, the Court of Appeals, and trial courts presiding in collateral matters. Such an approach is neither commanded by the constitution nor justified by sound public policy.

Reed, supra at 382-383. In the same way that the Court's test for ineffective-assistance-of-counsel claims serves to determine whether a defendant has established good cause for failure to raise a claim previously, the well-established test for determining whether a defendant has presented newly discovered evidence should serve to determine whether a defendant has presented a claim that is excepted from the one-motion rule due to newly discovered evidence.

The same concerns that were discussed in *Reed* apply today. To adopt a lesser standard (or a non-objective one) for claimants purporting they should be excepted from the one-motion rule is to subvert the court rules and their purpose. The Court engages in statutory construction in attempts to "avoid a construction that would render any part of the statute surplusage or nugatory." *People v Peltola*, 489 Mich 174, 181; 803 NW2d 140 (2011). Further, if there is no objective, established test for trial courts to apply, on what basis does a defendant appeal the denial of relief when the trial court did not misapply an established test announced by this Court? No one benefits from lack of clarity or from a subjective test.

Moreover, as Defendant acknowledges in her fact statement but does not address in her argument, Def's Appeal Br. 7, Defendant previously relied on this Court's well-established test

in the lower-court proceedings in support of her successive motion for relief for judgment, thereby recognizing that *Cress* is the test to apply when determining whether a claim satisfies the second exception under MCR 6.502(G)(2). See, e.g., 106b ("Ms. Swain should be granted relief from judgment and a new trial on the basis of newly discovered evidence – the recantation of [C.S.] – that warrants relief under the standard outlined by the Michigan Supreme Court in *People v Cress*."); (102b) ("Ms. Swain properly brings this successive motion for relief . . . under the exception noted in MCR 6.502(G)(2) as she is alleging newly discovered evidence of innocence. . . [t]his newly discovered evidence fits the four conditions required by the rule . . ." (quoting *People v Johnson*, 451 Mich 115, 118 n. 6; 545 NW2d 637 (1996)). See *Cress*, 468 Mich at 692 (citing *People v Johnson,* supra). Thus, Defendant formerly relied on the *Cress* test in support of her claim that she was entitled to file a successive motion under MCR 6.502(G)(2), and "[a] party who expressly agrees with an issue in the trial court cannot then take a contrary position on appeal." *Grant v AAA Michigan/Wisconsin (On Remand)*, 272 Mich App 142, 148; 724 NW2d 498 (2006) (citing *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000); *Roberts v Mecosta Co. Gen. Hosp.*, 466 Mich 57, 69; 642 NW2d 663 (2002) (additional citation omitted)).

Finally, analysis of post-conviction claims of actual innocence, including claims such as a defendant's claim that there is newly discovered evidence showing actual innocence, "must incorporate the understanding that proof beyond a reasonable doubt marks the legal boundary between guilt and innocence." *Schlup v Delo*, 513 US 298, 328; 115 S Ct 851; 130 L Ed 2d 808 (1994) ("whether a court is assessing eligibility for the death penalty under *Sawyer*, or is deciding

whether a petitioner has made the requisite showing of innocence under *Carrier*[.]")[7] In *Reed* this Court referenced *Schlup*, noting that the Supreme Court had "recently observed that the fundamental miscarriage of justice exception seeks 'to balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case.'" *Reed*, 449 Mich 375 n 12 (quoting *Schlup v Delo*, 513 US 298; 115 S Ct 851, 865; 130 L Ed 2d 808 (1995)). "The meaning of actual innocence . . . does not merely require a showing that a reasonable doubt exists in light of the new evidence, but rather that no reasonable juror would have found the defendant guilty." *Schlup*, 513 US at 329.

The People submit that reasons the Court adopted the *Strickland/Pickens* test in *Reed* are instructive here. But, also, because a defendant whose guilt has been proven beyond a reasonable doubt has lost the presumption of innocence, *Herrera v Collins*, 506 US 390, 399 (1993) ("the presumption of innocence disappears"), the highest standard should apply to scrutinize the defendant's post-conviction, post-appeal claim, particularly in the context of a successive motion for relief from judgment.

a. Defendant's evidence is not newly discovered and could have been discovered using reasonable diligence

A defendant seeking a new trial based on newly discovered evidence "must show that: (1) 'the evidence itself, not merely its materiality, was newly discovered'; (2) 'the newly discovered evidence was not cumulative'; (3) 'the party could not, using reasonable diligence, have discovered and produced the evidence at trial'; and (4) the new evidence makes a different result probable on retrial." *People v Cress*, 468 Mich at 692 (quoting *People v Johnson*, 451 Mich at

[7] *Sawyer v Whitley*, 505 US 333; 112 S Ct 2514; 120 L Ed 2d 269 (1992); *Murray v Carrier*, 477 US 478; 106 S Ct 2639; 91 L Ed 2d 397 (1986).

118 n 6.).[8] In the context of a motion brought under MCR 6.500, et. seq., the fourth requirement should incorporate the *Schlup* standard which, "does not merely require a showing that a reasonable doubt exists in the light of the new evidence, but rather that no reasonable juror would have found the defendant guilty." *Schlup*, 513 US at 329. The defendant bears the burden of meeting each of the four parts of this test. *People v Rao*, 491 Mich 271, 274; 815 NW2d 105 (2012).

Defendant has not met her burden and, based on the facts presented, cannot. It is undisputed that she knew the witness and had she used reasonable diligence, could have discovered that he spoke to Det. Picketts, assuming for argument that fact is true. Thus, the Court of Appeals properly determined that "defendant and her attorney were most certainly aware at all pertinent times of Book's ability to provide testimony concurring the abuse or lack thereof and defendant has thus failed to show that the evidence was newly discovered." (501a.) Defendant has failed to meet parts one and three of *Cress*, and her claim fails on this basis alone.

This Court has made the "unremarkable observation" that when a "defendant possesses knowledge of evidence at the time of trial, that evidence cannot be characterized as 'newly discovered' under the first part of the *Cress* test." *Rao*, 491 Mich at 273. Such is the case here – Defendant testified at trial that she and her sons lived with Dennis Book at the trailer on Nine Mile Road. (79b-80b.) As Defendant was intimately familiar with Book before trial she could have called him to testify at that time if she chose – a deliberate decision was made not to call him.

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[8] As this Court stated in *Rao*, *Cress* is actually a "recent[ ] reaffirma[tion]" of "the same four-part test for ruling on such motions" that the Court "has applied . . . for over a century." 491 Mich at 280 (citations omitted).

Trial counsel confirmed at the April 26, 2012 evidentiary hearing that Defendant told him about Book before trial, and that Book lived in the house during the relevant time period. (318a.) But, in speaking with Defendant and her father about Book, trial counsel said he "was chilled[,]" and that he understood Defendant and Book had "a bad break up and there was concern that he would not be a favorable witness." (310a-311a.) Thus, trial counsel did not interview Book or subpoena him for trial, affirming he believed Book would be a hostile witness, based on what he learned from Defendant and her father. (311a.) Trial counsel reiterated that he "was made aware that there was a bad break up. And there was not any likelihood that he would say anything favorable about my client." (320a.)

Defendant's father, George Johnson, similarly testified that he knew about Book, when Book lived with Defendant, and Mr. Johnson said he would have told Defendant's attorney everything he knew. (348a.) But Mr. Johnson added that he would have "told [Attorney Hettinger] I don't think I'd call him." (348a.) "When the evidence is claimed to be unavailable because of its incompatibility with the defendant's trial strategy, reasonable diligence requires the defendant to choose between that strategy and the evidence." *Rao*, 491 Mich at 284 (citation omitted). Defendant chose strategy.

"[A]pplying the interrelated first and third parts of the *Cress* test," *Rao*, 491 Mich at 281, to this case, where Defendant and her attorney knew Book, but did not want to risk calling him for strategic reasons – assuming for argument sake that he spoke to Detective Picketts and provided him with information favorable to the defense as Defendant alleges – this was information that Defendant could have discovered using reasonable diligence. "[T]he law affords a defendant procedural avenues to secure and produce evidence and, under *Cress*, a defendant must employ

these avenues in a timely manner because evidence that is known to the defendant, yet not produced until after trial, will not be considered grounds for a new trial." *Rao*, 491 Mich at 284. Defendant cannot meet her burden of showing reasonable diligence based on the facts presented.

b. Though not newly discovered, the evidence was not material and Defendant cannot show that no reasonable juror would have found her guilty

Although Defendant's claim fails under *Cress* based on her knowledge of the witness and because using reasonable diligence Defendant could have discovered the evidence she alleges was not disclosed; Defendant's claim also fails to meet the remaining parts of the *Cress* test. As an initial matter, Defendant conceded that this evidence would not be admissible at trial. (503a.) ("As defendant concedes on appeal, given that the statements to Detective Picketts constitute hearsay, they would not be admissible. MRE 802."). But, setting that aside, and taking all of the evidence into consideration, Defendant cannot show that the purported newly discovered evidence was not cumulative, material, and that it would make a different result probable on retrial, or, here, that no reasonable juror would have found her guilty had Book testified. *Cress*, 468 Mich at 692; *Schlup*, 513 US at 329.

Dennis Book was one of three boyfriends Defendant said she and her sons lived with after her divorce. Steve Way (the second) was called by the defense and testified that he lived with Defendant and her sons in the trailer between 1994 and 1995. (62a-63a.) Book was Defendant's next boyfriend (after Way) and Defendant testified that their relationship began in 1996 or 1997. (79b-80b.) R.S. testified that he was five years old when the first act occurred, recalling he was in "young fives" at school at the time. (23b, 28b.) Thus, Book did not live with Defendant and her sons when the abuse began – he moved in later, after the abuse had been ongoing, and any

testimony Book may have provided would not have covered this time period and cannot be considered material. Book could not testify about events that occurred within the residence before he lived there.

Additionally, the sexual abuse occurred at two separate locations. Dennis Book resided at only one of the two locations with Defendant and her sons (the trailer on Nine Mile) and could not testify about what occurred at the second (Defendant's parents' home). (47a, 16b.) In addition to his concern over the break-up, Defendant's father also recognized that the allegations occurred at different locations. (343a-345a.) ("Well, there was – part of the allegations [were] done at my house."). In light of the foregoing, and for additional reasons discussed below in relation to Defendant's *Brady* claim, had the defense exercised reasonable diligence and called Dennis Book as a witness at trial, Defendant cannot show that no reasonable juror would have found her guilty. Defendant's claim fails on all four points.

B. The Court of Appeals did not err in ruling Defendant's *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963) claim failed

The second question the Court ordered the parties to address is: "whether the defendant is entitled to a new trial premised on the prosecution's violation of the rule set forth in *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963)[.] (107b-108b.) The answer should be no. Even assuming that exculpatory evidence was suppressed as Defendant alleges (a point the People do not concede, as discussed below), because the evidence Defendant purports to be new evidence in support of her claim is not favorable to the defense and material, as discussed in the preceding section and further below, the Court of Appeals did not err in ruling that Defendant's *Brady* claim fails.

"[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v Maryland*, 373 US at 87. This Court recently clarified that "the components of a 'true *Brady* violation,'" are: (1) "the prosecution suppressed evidence;" (2) "favorable to the accused;" that (3) "is material." *People v Chenault*, 495 Mich 142, 150; 845 NW2d 731 (2014). The defendant bears the burden of establishing a *Brady* violation. See, e.g., *People v Schumacher*, 276 Mich App 165, 177; 740 NW2d 534 (2007) ("[D]efendant has failed to establish any of the elements necessary to prove a *Brady* violation[.]"). The prosecution does not have a duty to develop evidence for the defense. *People v Coy*, 258 Mich App 1, 21-22; 669 NW2d 831 (2003) (Citing *People v Burwick*, 450 Mich 281, 289 n 10; 537 NW2d 813 (1995) ("As our Supreme Court noted, neither the prosecution nor the defense has an affirmative duty to search for evidence to aid in the other's case.") And a new trial is not required "whenever 'a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict. . . ." *Giglio v United States*, 405 US 150, 154; 92 S Ct 763; 31 L Ed 2d 104 (1972) (citation omitted).

Detective Picketts died in November, 2010. Trial counsel recalled he received a call from an attorney from the Michigan Innocence Clinic about Dennis Book in December, 2011. (318a.) Defendant sought to add this claim and amend her successive motion for relief from judgment after Detective Picketts' death; therefore, the prosecution was unable to call him at the evidentiary hearing and he was unable to respond to Defendant's claim. However, the People contend that the trial court's finding that a phone interview took place that was exculpatory and suppressed, is clearly erroneous. The People also contend that the trial court's finding that "there

is no dispute that it was not disclosed" is clearly erroneous. (491a.) The prosecution has consistently disputed Defendant's contention that exculpatory information was suppressed and the prosecution cannot disclose something it (or law enforcement) does not have. "Findings of fact are clearly erroneous if, after review of the entire record, this Court is left with a definite and firm conviction that a mistake has been made." *People v Brown*, 205 Mich App 503, 505; 517 NW2d 806 (1994).

As the detective was not available, the prosecution presented the assistant prosecutor who tried this case with Detective Picketts as her lead investigator to testify at the hearing. The assistant prosecutor testified that she and Det. Picketts had a close working relationship and that typically, the decision who to interview was jointly made. In light of her relationship with Det. Picketts, and how they prepared cases for trial, the trial prosecutor believed Det. Picketts would have communicated with her about an interview concerning her case, and did not do so. (385a-386a, 402a-403a.) The trial prosecutor also confirmed she did not find a report regarding Book – she checked with the Sheriff's Department the day before the hearing to confirm that the last interview Det. Picketts conducted for this case was with Deborah Charles. (407a-408a.)

Thus, in light of the detective's death and the timing of this issue, the proof related to this case in support of Defendant's allegation that Det. Picketts received exculpatory information and suppressed it, came from one previously known witness of questionable credibility, Book. The Court of Appeals did not clearly err in finding that a *Brady* violation does not occur when the information is known to the defense. (505a.) Book was known to Defendant, but in light of his acknowledged hostility towards her, the defense did not want to risk calling him at that time. Where "evidence was available to [the defendant] from other sources than the state, and he was

aware of the essential facts necessary for him to obtain that evidence, the *Brady* rule does not apply." *Spirko v Mitchell*, 368 F3d 608, 611 (CA 6, 2004).

The fact that Book and Defendant broke up before trial and it may have been unpleasant or even difficult for Defendant to enlist his support does not create a *Brady* claim. (505a) (citing *Benge v Johnson*, 474 F3d 236, 244 (CA 6, 2007) (witness's refusal to assist defendant was not the prosecution's doing and did not create a *Brady* violation.). Moreover, even the trial court "recognize[d] the People's position that Book is either lying or is mistaken in whole or in part in his testimony. *Certainly there are issues concerning his credibility* that the People justifiably pursued at the evidentiary hearing." (490a.) (emphasis added).

Book's evidentiary hearing testimony conflicted with trial testimony, undermining his credibility and Defendant's claim. At trial, Defendant said after her divorce in 1991, she lived with Eldon McDowell until 1993 or 1994. (74b-76b.) After her relationship with McDowell ended, Defendant said she and her sons lived alone for a while. (75b.) Next, Defendant said she lived with Steve Way, in 1994 or 1995, and they were together until 1995 or 1996. (77b-78b.) Way confirmed in his testimony that he lived with Defendant and her sons in the trailer between 1994 and 1995. (62a-63a.) At trial, Defendant said that Book was her third boyfriend after her divorce and their relationship began in 1996 or 1997, contrary to Book's testimony that they began dating in 1994 (initially in an affidavit Book indicated it was even earlier, in 1993) and the relationship ended in 1996 or 1997. (80b, 171a-173a.) Thus, the main witness in support of Defendant's contention that the detective withheld information was of questionable credibility and his testimony conflicted with Defendant's trial testimony.

In any event, and again assuming for argument that a Book - Picketts call/interview took place, it was not exculpatory or material. As both Mr. Johnson and trial counsel indicated during the evidentiary hearing, there were multiple allegations, the majority of which occurred in the home of Defendant's parents, not in the trailer where Book stayed with Defendant. (320a-321a.) Trial counsel recalled the reports and testimony "centered on" the events in the parents' home (not the trailer Defendant shared with Book). (320a-321a.) And, as indicated above, Book's evidentiary hearing testimony conflicted with Defendant's (and Way's) trial testimony, which would have undermined her credibility in front of the jury which would not have been favorable to her defense. *Chenault*, 495 Mich at 150.

Moreover, in addition to R.S.'s trial testimony, other evidence was presented at trial which supports the jury's verdict, finding R.S.'s trial testimony credible, and Defendant's not. For example, R.S. and C.S. both testified that Defendant treated R.S. "like a boyfriend," and R.S. said Defendant treated C.S. "like a slave." (20b, 52a.) The boys also said that Defendant kissed R.S. on the lips and C.S. on the cheek or forehead. (21b, 52a.) These were facts that are reflected in Deborah Charles' testimony (who admittedly was not a model citizen as Charles became acquainted with Defendant while they were both incarcerated - a fact presented to the jury), and peculiar statements Defendant made to Charles were echoed by the boys' trial testimony.

For example, Charles said it was "quite eerie" how Defendant referred to R.S.'s appearance, telling Charles that she would kiss R.S. on the lips but C.S. on the cheek because R.S. was more attractive and Defendant said she could not help herself. (55a-56a.) Charles' testimony also reflects that she was familiar with Defendant's manner of speech and language, for example,

Charles said Defendant told her: "They're saying that I sucked my son's d***. I didn't suck that little bastard's d***." (60b.) When Detective Picketts met with Defendant, she also told him, "I never sucked my kid's d***." (59a, 54b.) On the witness stand, Defendant repeatedly used this same language. See e.g., 97b. Defendant also told Charles that she committed the acts on her son when she was high on crack, and that at times she did not know what she was doing. (54a-55a.) Although she denied she was high on crack and committed the acts on her son for that reason, Defendant admitted she used crack and prostituted herself to support her addiction. (96b-97b.)

After learning Charles was going to testify for the prosecution, another inmate was present when Defendant wanted Charles to sign a paper, disavowing what she disclosed, something to the effect: "sign this saying I didn't say that. . ." (100b-101b.) Defendant's younger son also indicated that pressure was being applied, writing a letter to Defendant:

> Stop being a big baby. It made me mad when you ran around all those nights. I hate when you boss me around . . . I hate it when you lie to us. Tell everyone to leave us alone until you get out of prison, from [C.S.]

(98b.)

Although a victim's testimony in a criminal sexual conduct case does not require corroboration, MCL 750.520h, in addition to the testimony, R.S. was exhibiting behavior that sexually abused children may exhibit. After moving into his father and step-mother's home, R.S. was referred to Dr. Randall Haugen, an expert in child sexual abuse and offenders, because R.S. was exhibiting sexually reactive behavior, compulsive masturbation, and hoarding. (41b.) R.S. was also having trouble at school and getting into fights. (13b-14b.)

Also, Dr. Haugen explained that, particularly in family situations, the child may deny or avoid discussing the abuse, and shares a close relationship with the perpetrator. The perpetrator will often "groom" the victim by spending extra time with them, nurturing them, or offering special gifts and privileges. (36b.) At trial, it became apparent that Defendant treated her sons differently. The boys said that R.S. was treated "like a boyfriend" while C.S. was treated "like a slave." (20b, 52a.) Though he was younger, C.S. did the majority of the chores; R.S. did few. Defendant gave R.S. more money and let him drive the car, though he was too young to drive. Both boys said Defendant kissed them differently. (21b, 52a.) Defendant said that R.S. had ADHD and required more attention than her younger son. She also said that she didn't discipline him like she should have and she "probably loved him too much for his own good[.]" (83b.)

Defendant emphasizes the fact that R.S. testified that the abuse occurred everyday. But, particularly in cases involving child victims, time is not of the essence or a material element of a criminal sexual conduct case. *People v Stricklin*, 162 Mich App 623, 634; 413 NW2d 457 (1987); *People v Dobek*, 274 Mich App 58, 82-83; 732 NW2d 546 (2007). R.S. lived with a mother who treated him like her boyfriend, sharing a bed with him, something R.S. said he tried to avoid: "I would lie and say that I'd be up in a minute when I wouldn't come up." (19b.) It should also be noted that when special procedures were implemented in the district court, R.S. said that "more than 20" acts occurred at each location. (4b, 6b.)

Similar emphasis has been placed on R.S.'s recantation. But recanted trial testimony is regarded with great caution and "has been traditionally regarded as suspect and untrustworthy." *People v Barbara*, 400 Mich 352, 362-363; 255 NW2d 171 (1977); *People v Canter*, 197 Mich App 550, 560; 496 NW2d 336 (1992). See also *United States v Rouse*, 410 F 3d at 1009 (CA 8

2005) ("in cases of child sexual abuse [ ] recantation is a recurring phenomenon, particularly when family members are involved and the child has feelings of guilt or the family members seek to influence the child to change [his] story.") (internal quotations omitted). R.S. admitted he had been pressured by family, and said nothing happened so that they would leave him alone. (29b; 395a-396a.) The letter R.S.'s brother wrote to Defendant was admitted at trial and also indicates C.S. and R.S. were being pressured. (98b.) In *People v White*, 411 Mich 366, 379; 308 NW2d 128 (1981) the Court stated in the context of perjured testimony:

> On the other hand, the trial process itself is the primary safeguard against inaccurate testimony. Cross-examination, rebuttal and impeachment are elements of the trial process intended to expose untruthful testimony. It is the function of the trier of fact to assess credibility as well to determine the facts.

And one need look no further than to *Cress* to see why polygraph examinations are not admissible in trial. See *Cress*, 468 Mich at 686-689; *Cress v Palmer*, 484 F3d 844, 854 (2007) ("Cress also contended that convicted-murderer Michael Ronning's confession . . . proves Cress's innocence and entitles him to relief. While serving a life sentence . . . in Arkansas, Ronning confessed . . . pursuant to an elaborate agreement arising from the efforts of Detective Mullen[.]"). And incest is shrouded in secrecy and shame – generally there are no eyewitnesses.

Defendant's claim fails to meet the requirements of *Cress* and the requirements for filing a successive motion for relief from judgment. Defendant has also failed to meet the requirements of establishing her underlying *Brady* claim. Although the People continue to dispute the trial court's factual finding that exculpatory evidence was suppressed, it is clear that Defendant could have produced Dennis Book with reasonable diligence, but, also, that had he been produced, he had nothing material to offer. MCR 6.502(G) barred Defendant's amended successive motion for relief from judgment.

ARGUMENT

II. The court rules for seeking post-appeal relief applied and barred granting relief to Defendant. The Court of Appeals did not err in determining Defendant is not entitled to relief under MCL 770.1, and Defendant was not entitled to relief from judgment under another provision of the court rules or the Constitution.

Standard of Review:

The trial court's decision on a motion for relief from judgment is reviewed for an abuse of discretion while factual findings in support of the trial-court decision are reviewed for clear error. *People v Swain*, 288 Mich App at 628. A court "by definition abuses its discretion when it makes an error of law." *Koon v United States*, 518 US at 100.

Questions involving the interpretation of a court rule are questions of law, reviewed de novo. *People v Hawkins*, 468 Mich at 497 (citations omitted). Questions of constitutional law are also reviewed de novo. *People v LeBlanc*, 465 Mich at 579.

Discussion:

In addition to determining that the trial court abused its discretion in granting Swain's successive motion for relief from judgment under the court rules and *Brady v Maryland*, the Court of Appeals did not err in ruling the trial court abused its discretion in granting relief to Defendant under the new trial statute, MCL 770.1, *Herrera v Collins*, 506 US 390; 113 S Ct 853; 122 L Ed 2d 203 (1993) or a freestanding claim of actual innocence.

A. The trial court may waive the good cause requirement if there is a significant possibility of innocence only when analyzing a claim under MCR 6.508(D)

The Court has asked, in question 3, what standard a trial court is to consider a defendant's claim of actual innocence in a successive motion for relief from judgment, and, in question 4,

whether MCR 6.500 et. seq. or other provision of the rules provides a basis for granting relief to a defendant who is able to demonstrate a "significant possibility of actual innocence." (107b-108b.) The "significant possibility of innocence" language in the court rule is not included in MCR 6.502(G)(2), but may apply to relieve a defendant from having to establish good cause for failure to raise a claim previously under MCR 6.508(D)(3)(a).

If a defendant filing his first motion for relief from judgment is unable to show good cause for failure to raise his claim previously, the court rule states that the trial court "may waive the 'good cause requirement' of subrule (D)(3)(a) if it concludes that there is a significant possibility that the defendant is innocent of the crime." MCR 6.508(D)(3). This language is only potentially relevant to a successive motion for relief from judgment if a defendant has initially overcome his burden of demonstrating that his case satisfies one of the two exceptions outlined in MCR 6.502(G)(2), which permits the successive motion to be filed.

This is consistent with the Court's stated policy behind MCR 6.500 et. seq., to put an end to serial motions for new trial and preserve finality. *Reed*, 449 Mich at 381, 388. As the Michigan Court of Appeals formerly determined in a prior appeal, only after a defendant establishes that he meets one of the two exceptions to the rule prohibiting successive motions for relief from judgment, MCR 6.502(G)(1), does the language in MCR 6.508(D) potentially become relevant. *People v Swain*, 288 Mich App 609, 632-633 (2010). The "significant possibility of innocence" provision only applies to claims under MCR 6.508(D) to overcome a procedural bar.

In *People v Reed*, 449 Mich at 378 n 1, the Court stated that:

> MCR 6.508(D) recognizes that the most fundamental injustice is the conviction of an innocent person and specifically allows the court to waive "the 'good cause' requirement of subrule (D)(3)(a) if it concludes that there is a significant

> possibility that the defendant is innocent of the crime." *If the petitioner in fact demonstrates that there is a significant possibility that he is innocent, the court may consider his claim without requiring the petitioner to demonstrate good cause* for his failure to raise the issue in an earlier proceeding.

(emphasis added). Looking then to: (1) the language of the rule; (2) the provision's placement in the rule; and (3) what this Court has previously stated regarding this provision: if a trial court determines that there is a significant possibility of innocence, it may waive the good cause requirement under MCR 6.508(D)(3)(a). Thus, this State currently recognizes that a defendant establishing a significant possibility of innocence may be excepted from demonstrating good cause for failure to raise a claim previously. But this section only pertains to the first motion for relief from judgment or to a defendant who satisfies the requirements for filing a successive motion for relief from judgment. Language from one rule should not simply be inserted into another as Defendant suggests. Def's Appeal Br, at 36. "[T]his violates the well-established rule of statutory construction that a court cannot read into a statute what is not there." *People v Perkins*, 473 Mich 626, 657; 703 NW2d 448 (2005) (citing *AFSCME v Detroit*, 468 Mich 388, 142; 662 NW2d 695 (2003)).

Defendant asserts that other provisions of the court rules – MCR 7.216 (Miscellaneous Relief) and 7.316 (Miscellaneous Relief Obtainable in Supreme Court) – provide a basis for granting relief. The People disagree. The miscellaneous relief provisions apply to cases proceeding under MCR 7.200 or MCR 7.300. A judgment that is no longer appealable under MCR 7.200 or MCR 7.300 "may be reviewed only in accordance with the provisions of this subchapter." MCR 6.501. And as discussed in Argument I.A., supra, the court rules are rules of procedure. The Court is not "'authorized to enact court rules that establish, abrogate, or modify

substantive law.'" *Watkins*, 491 Mich at 473 (quoting *McDougall*, 461 Mich at 27.)

In sum, under the court rules, if a court finds that the evidence demonstrates a significant possibility that a defendant is innocent, it may relieve a defendant from the burden of establishing good cause for failure to raise a claim previously under MCR 6.508(D), but a "significant possibility of innocence" alone does not entitle a defendant to relief. A defendant who has newly discovered evidence and satisfies the requirements of MCR 6.502(G)(2) is permitted to file a successive motion for relief from judgment, and thereafter may proceed to establish that he is entitled to relief from judgment. MCR 6.508(D). Here, as discussed in Argument I, supra, Defendant did not satisfy the requirements of MCR 6.502(G)(2), and her motion was barred.

B. A defendant who has exhausted his state-court remedies may be granted habeas relief from the federal court if he is in custody in violation of his federal constitutional rights – not based on a freestanding claim of actual innocence

MCR 6.500 et. seq. "supersede the former practice and replaced an equitable system of post-conviction relief with a more rigid approach that places many hurdles in a criminal defendant's path." Friedman, Hurdling the 6.500 Barrier: A Guide to Michigan Post-Conviction Remedies, 14 T.M. Cooley L Rev 65, 1. "The post-conviction rules are intended to provide the only post-conviction remedy once direct appeal has been exhausted." *Id.* The staff comment to MCR 6.501 (outlining the scope of the post-appeal relief chapter) also indicates that this new procedure "provides the *exclusive means* to challenge convictions in Michigan courts for a defendant who has had an appeal. . ." 1989 Staff Comment to MCR 6.501 (emphasis added).[9]

[9] Although the Comments made by Supreme Court staff members are not an authoritative resource, they are prepared "to assist the reader in identifying the substantive changes that the rules make from prior Michigan practice." 1985 Staff Comment to MCR 1.101.

1. Michigan's post-appeal rules were patterned after the federal habeas statute

The Court "chose to model MCR 6.508 after the federal habeas corpus statute because it serves important state interests." *People v Reed*, 449 Mich 375, 379; 535 NW2d 496 (1995). A defendant may seek a writ of habeas corpus from the federal court if he believes he is being held "in custody in violation of the Constitution or laws or treaties of the United States." 28 USC § 2254. "Section 2254(d) reflects the view that habeas corpus is a 'guard against extreme malfunction in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Harrington v Richter*, 562 US 86; 131 S Ct 770; 178 L Ed 2d (2011) (quoting *Jackson v Virginia*, 443 US 307, 332 n 5; 99 S Ct 2781; 61 L Ed 2d 560 (1979) (Stevens, J., concurring in judgment)). In 1996, Congress enacted standards of review in federal habeas proceedings with AEDPA, the Antiterrorism and Effective Death Penalty Act, in order to "prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." *Bell v Cone*, 535 US 685, 693-694; 122 S Ct 1843; 152 L Ed 2d (2002).

Defendant filed a petition in the federal district court that has been stayed pending the outcome of these state-court proceedings. (109b-110b). Therefore, Defendant is actively seeking relief from the federal courts, as other criminal defendants may do after exhausting their state-court remedies.

2. Post-conviction claims of actual innocence are appropriately subjected to high scrutiny and standards

In *Herrera v Collins*, 506 US 390, 399; 113 S Ct 853; 122 L Ed 2d 203 (1993), the Supreme Court emphasized that after a defendant has been convicted at trial, "the presumption of

innocence disappears." "Thus, in the eyes of the law, petitioner does not come before the Court as one who is 'innocent,' but, on the contrary, as one who has been convicted. . . ." *Id.* at 399-400. Claims of "actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation. . . ." *Id.* at 400. Accord *Cress v Palmer*, 484 F3d 844, 854 (2007) (quoting *Herrera v Collins*, 506 US at 400).

More recently, in *McQuiggan v Perkins*, ___ US ___ ; 133 S Ct 1924, 1931; 185 L Ed 2d 2019 (2013), the Supreme Court stated: "We have not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence." (Citing *Herrera v Collins*, 506 US at 404-405.) The Supreme Court determined that a claim of actual innocence may assist a petitioner in overcoming a procedural bar or the statute of limitations, 28 USC § 2244(d)(1), explaining that a petitioner asserting a claim of actual innocence may:

> have his federal constitutional claim considered on the merits if he makes a proper showing of actual innocence. [citing *Herrera* at 404]. See also *Murray v Carrier*, 477 US 478, 496; 106 S Ct 2639; 91 L Ed 2d 397 (1986) ("[W]e think that in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default.") *In other words, a credible showing of actual innocence may allow a prisoner to pursue his constitutional claims (here, ineffective assistance of counsel) on the merits notwithstanding the existence of a procedural bar to relief.* "This rule, or fundamental miscarriage of justice exception, is grounded in the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocence persons." *Herrera*, 506 US at 404, 113 S Ct 853.
>
> We have applied the miscarriage of justice exception to overcome various procedural defaults.
>
> * * *
>
> The miscarriage of justice exception, our decisions bear out, survived AEDPA's passage . . . a federal court may, consistent with AEDPA, recall its mandate in order to revisit the merits of a decision. [citing *Calderon v Thompson*, 523 US 538, 558; 118 S Ct 1489; 140 L Ed 2d 728 (1998)] ("The miscarriage of

> justice standard is altogether consistent . . .with AEDPA's central concern that the merits of concluded criminal proceedings not be revisited in the absence of a strong showing of actual innocence."). We held, in the context of § 2255, that actual innocence may overcome a prisoner's failure to raise a constitutional objection on direct review. Most recently, in [*House v Bell*, 547 US 518; 126 S Ct 2064; 165 L Ed 2d 1 (2006)], we reiterated that a prisoner's proof of actual innocence may provide a gateway for federal habeas review of a procedurally defaulted claim of constitutional error[.]

McQuiggan v Perkins, 133 S Ct at 1931-1932 (emphasis added).

The Supreme Court has not ruled that a freestanding claim of actual innocence entitles a petitioner to relief; though a claim of innocence may relieve a defendant from overcoming a procedural bar to permit a merits review of the alleged constitutional violation. Similarly, under Michigan's post-conviction procedure: a trial court may waive the good cause requirement under MCR 6.508(D)(3) if there is a "significant possibility of innocence," but the defendant must also show actual prejudice, MCR 6.508(D)(3)(b), and that "but for the alleged error, the defendant would have had a reasonably likely chance of acquittal." *Id.*

Although Defendant's successive motion was barred as discussed in Argument I, supra, and it is not necessary to reach this issue, this Court should reject Defendant's invitation to create law that the Supreme Court has not adopted, particularly where our post-conviction rules are patterned after the federal habeas statute. *Reed*, 449 Mich at 379 (The Court "chose to model MCR 6.508 after the federal habeas corpus statute because it serves important state interests."). Defendant is not entitled to relief from judgment based on a freestanding claim of innocence.

C. Defendant is not entitled to a new trial under MCL 770.1

The Court of Appeals did not clearly err in determining that the trial court improperly granted Defendant's successive motion for relief from judgment pursuant to MCL 770.1:

> The judge of a court in which the trial of an offense is held may grant a new trial to the defendant, for any cause for which by law a new trial may be granted, or when it appears to the court that justice has not been done, and on the terms or conditions as the court directs.

In another case in which a defendant's motion for relief from judgment was improperly granted based on MCL 770.1, the Michigan Court of Appeals aptly noted that, "the plain language of [MCL 770.1] clearly governs motions for new trial, not motions for relief from judgment, and the statute was therefore not applicable to the motion filed by the defendant." (516a). Just so – a trial court may not grant relief to a defendant pursuant to MCL 770.1 after time to appeal expires and Supchapter 6.500 et. seq. applies. MCL 770.2 also indicates that the statute applies to, "case[s] appealable as of right to the court of appeals[.]" MCL 770.2(1), and the court rule for making new trial motions instructs that:

> If the defendant is no longer entitled to appeal by right or by leave, the defendant may seek relief pursuant to the procedure set forth in subchapter 6.500.

MCR 6.431(A)(4) (Time for Making Motion).

Similarly, in *People v McEwan*, 214 Mich App 690; 543 NW2d 367 (1995), the Court of Appeals was presented with a case where the trial court granted the defendant a new trial although the defendant had not filed a motion for new trial. *Id.* at 694. The court found that MCR 6.431, "as the court rule governing new trials in criminal cases, control[led] [the] analysis." *Id.* (referencing MCR 6.431(B)). The plain language of MCR 6.431(B) states that a defendant who no longer has the right to appeal must proceed "pursuant to the procedure set forth in subchapter 6.500[,]" not MCL 770.1. As the Michigan Court of Appeals succinctly stated in the instant case, the time for filing a motion for new trial "under MCL 770.1 had long since passed." (506a.)

As discussed previously, Argument I.A., supra, "this Court's authority in matters of practice and procedure is exclusive and therefore beyond the Legislature's power to exercise." *Watkins*, 491 Mich at 472-473 (footnote and citations therein omitted). A court rule prevails over a conflicting statute when that statute infringes on the Court's constitutional authority to "establish, modify, amend and simplify the practice and procedure in all courts of this state." *Watkins*, 491 Mich at 472 (quoting Const 1963, art 6, § 5). As this Court has already discussed the procedural nature of MCR 6.500 et. seq. in *People v Reed*, 449 Mich 375; 535 NW2d 496 (1995), if deemed to be in conflict, MCR 6.500 prevails over MCL 770.1 in cases that are not capable of review under MCR 7.200 or 7.300. Cf *Watkins*, 491 Mich at 472 ("MCL 768.27a prevails over MRE 404(b)").

In short, where the Court has established the procedure for defendants seeking post-appeal relief to follow, the trial court's reliance on MCL 770.1 as a basis for granting relief was erroneous. To hold otherwise nullifies the subchapter of the court rules governing post-appeal relief and the purpose behind its passage.

D. The State has an important interest in preserving the finality of judgments

"[T]he presumption of innocence disappears[,]" after a defendant has been convicted at trial. *Herrera v Collins*, 506 US at 399. A conviction generally becomes final when the state-court direct appeal has been exhausted (or the time to file it has expired) and the time to petition the Supreme Court for a writ of certiorari has expired (or when a petition is denied if one is filed). *Beard v Banks*, 542 US 406, 411; 124 S Ct 2504; 159 L Ed 2d 494 (2004). Defendant lost the presumption of innocence with the jury's verdict and her conviction was final years ago.

Allowing a trial court to vacate a jury's verdict under the circumstances such as were seen here erodes a cornerstone of our justice system – the finality of verdicts. "[F]inality of verdicts is required under the Double Jeopardy Clause and is desirable as a matter of public policy." *People v Jones*, 203 Mich App 74, 82; 512 NW2d 26 (1993). Accord *People v McEwan*, 214 Mich App 690, 695; 543 NW2d 367 (1995) (citation omitted) ("In criminal cases, finality of verdicts is required under the Double Jeopardy Clause."). As recognized when the rules were drafted:

> The collateral postconviction remedy provided by subchapter 7.400 should be regarded as extra-ordinary. *Lacking any statute of limitations, this remedy has the potential for seriously undermining the state's important interest in the finality of criminal judgments*. Such a cost is appropriate only to prevent manifest injustice. Stated differently, collateral postconvicton remedies should have a narrower role than direct appeal; errors that may warrant appellate reversal of a conviction may not warrant postconviction relief.

Reed, 449 Mich at 388-389 (quoting Proposed Rules of Criminal Procedure, 428A Mich 50 (1987) (emphasis added)). And as Justice Corrigan cautioned:

> [T]he "failure to value finality and impose page and time limits on cases on collateral review reminds me of Chief Justice Rehnquist's statement: "we believe the adoption of the *Francis* rule [requiring cause and prejudice] in this situation will have the salutary effect of making the state trial on the merits the 'main event,' so to speak, rather than a 'tryout on the road' for what will later be the determinative federal habeas proceeding." *Wainwright v Sykes*, 433 US 72, 90 (1977). Following rejection of the committee's recommendation, Michigan courts will continue to make trial the road-show tryout for the collateral hearings to follow.

Corrigan, J. (dissenting in part) Comment to 2006 Amendment, MCR 6.502.

Moreover, in *Murray v Carrier*, 477 US at 490-491, the Supreme Court stated that "[a] State's procedural rules serve vital purposes at trial, on appeal, and on state collateral attack. The important role of appellate procedural rules is aptly captured by the Court's description in *Reed v Ross*, 468 US 1; 104 S Ct 2901; 82 L Ed 2d 1 (1984). . ." which discussed "[t]hese legitimate state interests":

> It affords the state courts the opportunity to resolve the issue shortly after trial, while evidence is still available both to assess the defendant's claim and to retry the defendant effectively if he prevails in his appeal. See Friendly, Is Innocence Irrelevant: Collateral Attack on Criminal Judgments, 38 U.Chi.L.Rev. 142, 147 (1970)). This type of rule promotes not only the accuracy and efficiency of judicial decisions, but also the finality of those decisions, by forcing the defendant to litigate all of his claims together, as quickly after trial as the docket will allow, and while the attention of the appellate court is focused on his case." 468 U.S., at 10-11, 104 S.Ct., at 2907.

Here, that did not occur. For example, after Defendant's application for leave to appeal from 288 Mich App 609 (2010) was denied and the prosecution sought to revoke Defendant's bond (heard on January 3, 2011), the defense stated they intended to file a motion for reconsideration with this Court, but, also:

> if necessary at some point, move to amend the motion . . . it's going to be our argument, if we have to get there . . . that that issue is ripe for review. We can amend a motion for [ ] relief from judgment at any time under the court rules, and we will be asking for relief based on that new claim [regarding C.S.].

(103b-104b.) This Court indicated in *People v Rao*, in its discussion of *Cress*, newly discovered evidence, and "the principles of fairness and finality on which *Cress* is grounded[,]" that "judicial sandbagging" should be discouraged, quoting *People v Terrell*:

> [The defendant's] evidence is not newly discovered because allowing criminal defendants to raise such allegations [i.e., that an uncalled witness's proposed testimony is newly discovered evidence] after a judgment of conviction has been entered . . . would permit them to "sandbag" the fairness of the trial by withholding or failing to seek material, probative evidence and later attempting to collaterally attack their convictions. . . . [289 Mich App at 566; 797 NW2d 684 (second alteration in original) (quotation marks and citations omitted).]

Rao. 491 Mich at 285 (quoting *Terrell*, 289 Mich App 553, 566; 797 NW2d 684 (2009)).

Our criminal justice system, and the vulnerable victims it is designed to serve, cannot withstand lack of finality such as occurred in this case. The Governor may grant a pardon under

our Constitution, Const 1963, art 5, § 14, but trial courts should faithfully adhere to the procedure established by this Court to maintain the integrity of the process – preserving the trial as the cornerstone of that process – as opposed to the collateral proceedings which follow.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff-Appellee, the People of the State of Michigan, respectfully request this Honorable Court affirm the February 5, 2015 decision of the Michigan Court of Appeals and reinstate Defendant-Appellant's conviction and sentence. Further, the People request that this Court grant any additional or alternative relief that this Court deems necessary and just in order to effectuate reinstatement of Defendant-Appellant's conviction and sentence and that her bond be rescinded so that the Michigan Department of Corrections may take jurisdiction of her.

Respectfully submitted,

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DATED: December 15, 2015

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